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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH FRANCIS NARDELLO and ISADORE WEISBERG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Appendix A, *infra*, pp. 12-18) is not yet reported.

JURISDICTION

On January 2, 1968, the district court entered an order dismissing indictments against appellees on the ground that the criminal statute in question (18 U.S.C. 1952) does not encompass the type of activity

in which defendants were alleged to have engaged. Notice of appeal to this Court was filed with the district court on January 30, 1968.

Section 3731 of the Criminal Code confers on this Court jurisdiction to review, on direct appeal, a judgment dismissing an indictment, when that dismissal is based on the construction of the statute on which the indictment is founded. *United States* v. *Fabrizio*, 385 U.S. 263, 266.

QUESTION PRESENTED

Whether 18 U.S.C. 1952, making it a federal crime to travel in or use the facilities of interstate commerce to promote "extortion" in violation of state law, covers extortionate conduct which is captioned "blackmail" rather than "extortion" in the state penal code.

STATUTE INVOLVED

18 U.S.C. 1952 provides:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraph (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Sections 4802, 4803 and 4318 of the Pennsylvania Penal Code are set forth in Appendix B, *infra*, pp. 19-20.

STATEMENT

The instant prosecutions arose from the government's efforts to deal with an interstate ring which extorts money from victims on threat of exposure to charges of homosexuality. The three indictments immediately involved were returned against various participants in the ring by a federal grand jury in the Eastern District of Pennsylvania. They charged substantive violations of 18 U.S.C. 1952, and conspiracies to violate that section, by travelling in interstate commerce from Chicago, Illinois, and from New Jersey to Philadelphia, Pennsylvania, with intent to promote, and thereafter promoting, an unlawful activity: specifically, blackmail by injury to reputation and business, and blackmail by accusation of a heinous crime, in violation of Sections 4802 and 4803 of the

Pennsylvania Penal Code (reprinted *infra*, App. B. 19-20).

As the district court noted in its opinion dismissing the indictments, the defendants "were allegedly involved in an interstate ring specializing in the 'shaking down' of certain prominent victims whom members of the ring would entice into a compromising homosexual experience and then threaten with exposure unless a price were met" (App. A. 12). The nature of the scheme further appears from the allegations in the conspiracy counts (see, *e.g.*, Count II of Indictment No. 22709): some of the defendants represented to the victim that they were detectives of the Philadelphia Police Department and had warrants for the victim's immediate arrest.

On motion of the appellees,[1] the district court dismissed the three indictments. The court ruled that "extortion," as used in Section 1952, includes only acts in violation of the section of the Pennsylvania Penal Code specifically so entitled (18 Pa. Stat. 4318) (App. B. 19). Since that section applies only to the

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[1] Although the opinion below is entitled *United States* v. *Burke, Kaminsky, Nardello,* and *Weisberg* (App. A. 12), only Nardello and Weisberg moved to dismiss the indictments, and since the indictments stand dismissed as to them only they are the only appellees here. The title to the district court's opinion is based on the fact that the lead indictment (No. 22709) named the above-mentioned four defendants. Appellee Nardello was also charged in indictment No. 22717, and both he and appellee Weisberg were named in No. 22718. Neither Burke nor Kaminsky (a fugitive), nor any other defendant charged in the latter two indictments, joined in the successful motions to dismiss.

conduct of persons holding public office, and since appellees were not alleged to be public officers, the court held that the indictments failed to charge an offense under the federal statute. Acts of private persons in obtaining money through threat of injury or accusation are made criminal by Pennsylvania law, but they are formally termed "blackmail." Appellees had been charged with promoting schemes in violation of these state statutes, 18 Pa. Stat. 4802 and 4803, which are entitled "Blackmail by injury to reputation or business" and "Blackmail by accusation of heinous crime" respectively. (See App. B. 19-20.) The district court, however, construed the federal anti-racketeering law as evincing a congressional intention that the term "extortion" as used in Section 1952 should "track closely the legal understanding under state law" and "was not designed to be more generic in scope" (App. A. 14). The court concluded that Pennsylvania does not consider the conduct here alleged a form of "extortion," and accordingly dismissed the indictments.

THE QUESTION IS SUBSTANTIAL

1. The district court's construction of an important anti-racketeering statute drastically restricts the operation of federal legislation in this field. The recent addition of Section 1952 to the federal Criminal Code was designed to bolster local law enforcement by denying the facilities of interstate commerce to those engaged in certain types of unlawful activity found to be the principal occupations of persons in-

volved in organized crime.[3] While the statute is addressed, *inter alia*, to "extortion * * * in violation of the laws of the State in which committed," neither the language of the section nor its legislative history warrants limiting its reach only to those states in which the obtaining of money or property by threats is formally denominated extortion. Such a strained construction would mean that Congress rendered this measure inapplicable to extortionate activities in the more than one-third of the fifty states (see Appendix C, *infra*, p. 21) where this type of conduct is outlawed, but under a different name.[5] This question of congressional purpose becomes especially significant in light of the fact that the use of force and threats is the key to so-called "loan shark" operations which provide organized crime with its second largest source of revenue.[4]

Undeniably, Congress rested the applicability of Section 1952 on a finding that the particular activity sought to be carried on is unlawful under the laws of the state in which the conduct occurs. From this premise the district court drew the conclusion that application of the federal sanction depends on whether the state penal code has used labels conforming to

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[3] Hearings on S. 1653 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 17 (1961).

[5] We note that Section 223.4 of the Model Penal Code (Prop. Off. Draft 1962) would categorize the type of conduct here alleged as a form of "Theft": "Theft by Extortion."

[4] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 189 (1967).

the terminology of the federal statute. Congress, however, was concerned with general categories of crime, and not preoccupied with captions. Thus, if the conduct alleged is within the generic meaning of "extortion," *and* if it is activity prohibited by state law, it should, we believe, make no difference whether the state lists the crime under the heading "blackmail" or some other term.

In referring to congressional awareness that the content of laws governing "gambling" would vary substantively from state to state, and inferring that the same understanding must apply to use of the term "extortion" (App. A. 14), the district court misapprehended the purpose and effect of making state norms controlling. The objective of assisting state law enforcement efforts is reflected in the withholding of federal penalties for conduct which is not an offense at all under state law. But this scarcely means —to use the district court's example—that whether Section 1952 applies to promotion of illegal "gambling" turns on the caption identifying anti-gambling provisions in the state code. Respect for a state's decision to allow certain forms of gambling to take place lawfully does not fairly imply that the federal statute fails to reach the forms of gambling made illegal, albeit under a different name. By reading into the section the peculiar variations of state terminology, the district court has decided an important question of federal law in a way which makes form control over substance and frustrates Congress' purpose.[5]

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[5] Thus, in states like Pennsylvania, the district court's reading of Section 1952 would render that statute practically

The only federal decision relied on by the court below to support its conclusion actually undermines the district court's contrary position. In *McIntosh* v. *United States*, 385 F. 2d 274 (C.A. 8), defendants were charged with violating 18 U.S.C. 1952 by using interstate telephone facilities to promote extortion in violation of Section 560.130 of the Annotated Missouri Statutes, which is entitled "Robbery in the third degree." The acts prohibited are similar to those covered by the Pennsylvania blackmail statutes, 18 Pa. Stat. 4801-4806. The precise holding of the court of appeals was that the government was not required to prove that the defendants actually received the proceeds of the extortion (an essential element of the state offense). In so holding, the court expressly adopted the government's position that "[r]eference to the state law is necessary only to identify the type of unlawful activity in which the accused was engaged." 385 F.2d at 276.[6] Implicit in the decision is the conclusion that the indictment properly charged a federal offense.

2. It is undeniable that the conduct charged to appellees is made unlawful by the Pennsylvania blackmail statutes, 18 Pa. Stat. 4802 and 4803. It also seems clear, though in our view it is not essential, that even in Pennsylvania such conduct is considered "extortion." While the origin of the offense of "ex-

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meaningless, since if only public officers of the state can commit "extortion" it is highly unlikely that such "extortionists" would be using interstate facilities.

[6] The district court materially altered the meaning of this quotation by deleting the word "only." See App. A. 14.

tortion" lay in the exaction of illegal fees by public officers—as the captions in the Pennsylvania and other state codes illustrate—the term now has a broader, established meaning. Indeed, Section 4803 of the Pennsylvania Criminal Code, alleged by the instant indictments to have been violated, reads (18 Pa. Stat. 4803):[7]

> Whoever accuses any person of any heinous crime * * * with a view and intent to *extort* or gain money from such person * * * any money or property, is guilty of a felony * * *. [Emphasis supplied.]

In circumstances similar to those present in this case, the Pennsylvania Superior Court recognized the essential identity of extortion and blackmail when it upheld a conviction for violation of 18 Pa. Stat. 4803 under an indictment which charged "extortion by accusation of heinous crime." *Commonwealth* v. *Downer*, 159 Pa. Super. 626, 632, 49 A. 2d 516 (1946).[8]

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[7] The other Pennsylvania "blackmail" statutes, 18 Pa. Stat. 4801, 4802 (the latter also alleged in the indictments to have been violated) also use the term "extorts" in the operative definitions of proscribed conduct. These are the equivalent of the modern statutes labeled extortion in other states.

It is interesting to note that the movement toward the modern extortion statutes, in effect in the majority of the states, developed in the context of threats to accuse the victim of sodomy. Perkins, *Criminal Law*, 324-327 (1957); Michael and Wechsler, *Criminal Law and Its Administration*, 384-386 (1940).

[8] See, also, *Commonwealth* v. *Bernstine*, 103 Pa. Super. 518, 157 Atl. 698 (1931), affirmed, 308 Pa. 394, 162 Atl. 297 (1932); *Commonwealth* v. *Burdell*, 380 Pa. 43, 48, 110 A. 2d 193 (1955) (dictum).

3. It was the interstate mobility of participants in organized criminal activity that was of primary concern to the Congress.[9] Indeed, this case confirms the congressional judgment that federal anti-racketeering legislation was necessary to supplement state and local law enforcement. The typical city police force faces an almost impossible task in attempting to uncover and prosecute a criminal venture mounted by persons who arrive in the jurisdiction shortly before its completion and quickly slip back across a state border to obtain sanctuary. As the President's Commission on Law Enforcement and Administration of Justice recently explained,[10]

> No State or local law enforcement agency is adequately staffed to deal successfully with the problems of breaking down criminal organizations * * *. Local police are hampered by their limited geographical jurisdiction, and law enforcement has not responded by developing sufficient coordination among the agencies.

In these cases, the indictments allege that the appellees traveled from Illinois and from New Jersey to promote or execute acts of extortion in Pennsylvania. These activities, however captioned, were illegal under the laws of Pennsylvania.

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[9] Hearings on S. 1653, *supra*, at 17.

[10] *The Challenge of Crime in a Free Society*, *supra*, at 199.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should note probable jurisdiction and reverse the judgment of the district court.

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